

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA	:	CIVIL ACTION
	:	No. 98-6021
v.	:	
	:	
JOSEPH MCNAIR	:	CRIMINAL ACTION
	:	No. 95-124-09

MEMORANDUM

YOHN, J.

April , 1999

Joseph McNair pleaded guilty to drug charges and was sentenced on November 7, 1995. He filed a motion under 28 U.S.C. § 2255 on November 16, 1998. For the reasons stated below, defendant's motion will be denied.

BACKGROUND

This action arises from defendant's participation in the Idris Enlow Crack Cocaine Organization, which operated in the Germantown neighborhood of Philadelphia, Pennsylvania from 1990 to 1994. Defendant pleaded guilty to one count of conspiracy to distribute cocaine base (crack) in violation of 21 U.S.C. § 846 and two counts of possession with intent to distribute cocaine base in violation of 21 U.S.C. § 841. The possession with intent to distribute counts are based on conduct leading to defendant's arrests in January 1993, which resulted in state court convictions. In defendant's federal sentencing, his total offense level was thirty-nine which suggested a sentencing range of 262 to 327 months. On November 7, 1995, the court sentenced defendant to 108 months, however, granting a substantial departure in light of defendant's

cooperation with the government in the prosecution of other members of the Enlow Organization. McNair did not file a direct appeal.

On November 16, 1998, McNair filed the instant motion to vacate, set aside, or correct his sentence. In his motion he challenges his sentence on, essentially, three separate grounds: (1) ineffective assistance of counsel;¹ (2) the involuntary nature of his guilty plea; and (3) double jeopardy. Def.'s Mot. at 3-4. Because the motion is barred under § 2255's statute of limitations and defendant's claims are meritless, McNair's motion will be denied.

DISCUSSION

1. Untimeliness

Prior to April 24, 1996, federal prisoners had almost unlimited time to file a federal habeas petition. As of that date, however, 28 U.S.C. § 2255 was amended to provide for a new limitations period, pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub.L. No. 104-132, § 105, 110 Stat. 1214, 1220 (1996). The current version of the statute provides, in relevant part:

A 1-year period of limitations shall apply to a motion under this section. The limitations period shall run from the latest of--

¹McNair makes two claims of ineffective assistance of counsel. First, defendant alleges in Ground One that his attorney failed to file a motion to "suppress statements of Idris Enlow who had substantial reason to lie and received something of value in violation of USC¶201(c)(2) [sic] because the Government promised him something of value in exchange for testimony." Def.'s Mot. at 4. Second, in Ground Three, McNair claims he was denied the right to appeal because "counsel advised me that there was no legal way to appeal this conviction and sentence. . . . [counsel] advised me by letter that I had no grounds for appeal. He never mentioned ¶18 USC §201 (c)(2) [sic]. I discovered this ground from reading the historic Singleton Case." Def.'s Mot. at 5.

- (1) the date on which the judgment of conviction becomes final;
- (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
- (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255 (1997). If a prisoner's judgment became final prior to the enactment of AEDPA, the Third Circuit determined that a court could not dismiss as untimely any § 2255 motion filed on or before April 24, 1997. See Burns v. Morton, 134 F.3d 109, 112 (3d Cir. 1998). Applying this rule gave prisoners "one full year with notice to file such motions." Id. Motions filed after the one-year grace period, however, are subject to dismissal for failure to adhere to the new timing limitations of § 2255. See United States v. Duffus, No. 98-1548, 1999 WL 232563, at *1 (3d Cir. April 20, 1999) ("the effect of Burns v. Morton was to make . . . all other convictions in this circuit otherwise final before the effective date of the AEDPA, April 24, 1996, final on that day for purposes of calculating the limitations period under section 2255").

McNair's judgment of conviction was entered on November 21, 1995. He did not pursue an appeal. His conviction and sentence, therefore, became final on approximately December 2, 1995, when his opportunity for direct appeal lapsed. See Kapral v. United States, 166 F.3d 565, 577 (3d Cir. 1999) (holding that where defendant does not file direct appeal, "conviction and sentence become final, and the statute of limitation begins to run, on the date on which the time for filing such an appeal expired"); Fed. R. App. P. 4(b) ("defendant shall file the notice of appeal in the district court within 10 days after the entry either of the judgment or order appealed

from”). As this occurred prior to the enactment of AEDPA, McNair had until April 24, 1997, to file a timely motion under § 2255. See Burns, 134 F.3d at 112. The instant motion, however, was not filed until November 1998. Because of McNair’s delay in filing his motion and because the motion does not meet any of the exceptions provided in subsections (2) through (4) which allow the statute of limitations to be extended,² the motion will be denied as untimely.

²In an apparent effort to bypass the one-year statute of limitations pursuant to subsection (4), McNair asserts in Ground One that his claim of ineffective assistance of counsel claim is based on new information. Subsection (4) gives a defendant one year to file from the date that he or she could have discovered the facts supporting the claim. See 28 U.S.C. § 2255. The only new information asserted by defendant is the Tenth Circuit’s decision in United States v. Singleton, 144 F.3d 1343 (10th Cir. 1998), which was decided on July 1, 1998. McNair contends that, under Singleton, his attorney: (1) should have sought the exclusion of certain statements made by a witness cooperating with the government and (2) had a basis for appeal that was not pursued.

McNair’s invocation of subsection (4) fails for two reasons. First, defendant does not contend that he did not know the factual basis of his claim at the time sentence was imposed, but rather he argues that he was unable to discover the legal basis of his claim because Singleton was not decided until 1998. Under the explicit terms of the statute, as well as the federal common law version of the “discovery rule,” a claim accrues when the defendant knows the facts underlying his claim, not the legal basis for any claim which may arise from those facts. See 28 U.S.C. § 2255 (limitation period begins when “facts supporting the claim” are discoverable); New Castle County v. Halliburton NUS Corp., 111 F.3d 1116, 1125 (3d Cir. 1997) (“Under the discovery rule, a claim accrues upon awareness of actual injury, not upon awareness that the injury constitutes a legal wrong.”). Because McNair was clearly aware of the facts underlying his § 2255 claim at the time the court imposed sentence, the statutory version of the discovery rules found in § 105 of AEDPA is of no aid to him.

Second, even if discovery of the legal basis of a claim could toll the statute of limitations pursuant to subsection (4), McNair’s claim would still fail. Defendant’s alleged recently discovered legal basis for relief is no basis at all. The case relied upon by defendant is no longer binding precedent in the Tenth Circuit -- the panel decision was vacated when the Tenth Circuit heard the case en banc. Subsequently, in United States v. Singleton, 165 F.3d 1297, 1298 (10th Cir. 1999), the court of appeals, en banc, rejected the reasoning and conclusion of the earlier decision, holding that “18 U.S.C. § 201 (c)(2) does not apply to the United States or an Assistant United States Attorney functioning within the official scope of the office.” Furthermore, the holding of the decision cited by defendant was never the law in the Third Circuit, and courts in this district consistently have reached the opposite conclusion to that held by the three-judge panel originally hearing the case. See, e.g., United States v. Scavetti, No. 97-279-02, 1999 WL

Even if the motion were not denied because of its lack of timeliness, the claims would be denied on the merits as follows.

2. Ineffective Assistance of Counsel

In Grounds One and Three, McNair alleges that his trial counsel was ineffective for failing to recognize the legal significance of United States v. Singleton, 144 F.3d 1343 (10th Cir. 1998), and to take action accordingly. A two-part test is applied to claims of ineffective assistance of counsel. The defendant must first show that “his or her attorney’s performance was, under all the circumstances, unreasonable under professional prevailing norms.” United States v. Day, 969 F.2d 39, 42 (3d Cir. 1992) (citing Strickland v. Washington, 466 U.S. 668, 687-91 (1984)). Second, the defendant must establish a “reasonable probability that, but for counsel’s unprofessional errors, the result would have been different.” Strickland, 466 U.S. at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id. The defendant bears the burden of proving a claim of ineffective assistance of counsel. See Government of Virgin Islands v. Nicholas, 759 F.2d 1073, 1081 (3d Cir. 1985).

At the time of the guilty plea and during the period allotted for direct appeal in 1995, McNair’s counsel could not have acted pursuant to or even in anticipation of the Singleton panel decision because that decision was not issued until July 1, 1998. Moreover, as noted earlier, that decision has since been vacated and the holding subsequently rejected by the Tenth Circuit after

80368 (E.D. Pa. Feb. 2, 1999) (finding that § 201 (c)(2) does not apply to federal prosecutors who negotiate lesser sentences for defendants who testify against co-defendants); Nero v. United States, No. 97-321-02, 1998 WL 744031 (E.D. Pa. Oct. 23, 1998) (same). Consequently, defendant discovered neither new facts nor even a new legal ground for relief such that the time allowed for filing his motion pursuant to § 2255 would extend to November 1998.

rehearing the case en banc. See United States v. Singleton, 165 F.3d 1297 (10th Cir. 1999). An attorney does not act unreasonably where he or she fails to raise a legal argument pursuant to a non-binding decision that did not exist at the relevant time and has since been stripped of its persuasive authority.

3. Voluntariness of Plea

In Ground One, McNair also claims that his attorney and the assistant U.S. Attorney promised that he would serve no more than five years if he pled guilty. McNair received nine years. To warrant even an evidentiary hearing, such claims require more than vague allegations:

A petitioner challenging the voluntary nature of a facially valid guilty plea on the basis of unfulfilled promises or representations by counsel must advance specific and credible allegations detailing the nature and circumstances of these statements. A collateral challenge to a guilty plea may be summarily dismissed ‘when [the petitioner’s] allegations of an unkept promise are inconsistent with the bulk of his conduct, and when he offers no detailed and specific facts surrounding the agreement.

Lesko v. Lehman, 925 F.2d 1527, 1537-38 (3d Cir.) (citations omitted) (alterations in original), cert. denied, 502 U.S. 898 (1991); accord Blackledge v. Allison, 431 U.S. 63, 74 (1977) (stating that “summary dismissal” warranted where defendant offers only “conclusory allegations” to contradict previous declarations made in open court).

McNair has provided the court with nothing more than his bare assertion that the attorneys promised him a lesser sentence than he received. Moreover, the Guilty Plea Agreement and guilty plea colloquy clearly contradict defendant’s claim that any other promises had been made. The agreement, signed by defendant, contains the following two statements: (1)“No one has promised or guaranteed to the defendant what sentence the Court will impose.” and (2)“It is agreed that no additional promises, agreements or conditions have been entered into other than

those set forth in this document, and none will be entered into unless in writing and signed by all parties.” Guilty Plea Agreement ¶¶ 7, 9. During the guilty plea colloquy, defendant stated that no one had instructed him to respond to any questions with anything but a truthful answer. See Tr. of Change of Plea Hr’g, Dated June 16, 1995 (“Tr. of Plea Hr’g”), at 2. During the proceeding, the McNair answered affirmatively to the following questions by the court regarding the plea agreement:

Now, the actual agreement is the written document your attorney is holding in his hand, do you understand that? That’s the real plea agreement. Mr. Hall has summarized it for the record. Do you understand that?

And did you understand that document?

And did you have enough time to discuss it with your attorney and make your decision to plead guilty on the basis of that agreement?

And this contains the terms of the plea agreement as you understand those terms?

Id. at 17. McNair answered “No” to these two questions:

And did anybody force you or threaten you to get you to plead guilty and enter into this plea agreement?

Anybody made promises to you of any kind other than the plea agreement set forth in this document?

Id. at 17-18. None of McNair’s answers provide any indication that the attorneys made additional promises not incorporated into the plea agreement.

Because defendant’s allegations are unsupported and lack any specificity, and because the record of the plea proceedings overwhelmingly contradicts defendant’s conclusory contention, the claim is subject to summary dismissal. See Blackledge, 431 U.S. 63, 73-74; United States v. Oidac, Crim. No. 92-48-2, 1995 WL 464316, at *5 (E.D. Pa. July 31, 1995)

(dismissing without evidentiary hearing defendant's vague and unsubstantiated claim that government had promised him lighter sentence than received); Nwachia v. United States, 891 F. Supp. 189 (D.N.J. 1995) (dismissing without evidentiary hearing claim where only evidence relied on by defendant was his own allegation and subsequently disavowed affidavit of trial attorney), aff'd, 77 F.3d 463 (3d Cir. 1996); cf. Zilich v. Reid, 36 F.3d 317 (3d Cir. 1994) (holding that state prisoner entitled to evidentiary hearing where had offered specific testimony supporting allegation that attorney had made promises not contained in plea agreement).

In Ground Two, McNair further asserts that his guilty plea was not voluntary because his "conviction [was] obtained without understanding of the nature of the charge and the consequences of Guilty Plea." Def.'s Mot. at 4. He claims "I was not aware of the consequences of my plea. I relied on the advice of trial counsel. Prosecutor agreed [sic] in this promise." Id. The guilty plea colloquy, however, thoroughly explored defendant's ability and willingness to enter a guilty plea and his understanding of the terms of the agreement all in accordance with Federal Rule of Criminal Procedure 11. See Tr. of Plea Hr'g. During the change of plea hearing, defendant did not exhibit any signs that he did not understand the nature of his guilty plea or that his decision to plead guilty was not voluntary. Again, McNair has not provided any specific allegations in his petition to overcome the "strong presumption of verity" attributed to the "solemn declarations [that he made] in open court." Blackledge, 431 U.S. at 74. Without more specific information, his allegations of involuntariness provide no basis for granting his motion to vacate the sentence.

Additionally, McNair has waived his right to collateral review of this claim -- he has shown neither a cause that would excuse his failure to raise the claim at the guilty plea,

sentencing hearing, or on direct appeal, nor actual prejudice resulting from the claimed error.

See United States v. Frady, 456 U.S. 152, 167-68 (1982). Although a showing of a fundamental miscarriage of justice would excuse the failure to raise the claim earlier, McNair has made no allegation that such an injustice occurred. Consequently, his claim in Ground Two is also barred by procedural default.

4. Double Jeopardy

McNair raises a double jeopardy argument based on his state prosecution on the possession charges arising out of his two January 1993 arrests. The dual sovereignty doctrine, however, renders this argument meritless. A prior prosecution by the Commonwealth of Pennsylvania cannot bar a subsequent federal prosecution arising out of the same facts. As the Third Circuit has noted, “The ‘dual sovereignty’ doctrine rests on the premise that, where both sovereigns legitimately claim a strong interest in penalizing the same behavior, they have concurrent jurisdiction to vindicate those interests and neither need yield to the other.” United States v. Pungitore, 910 F.2d 1084,1105 (3d Cir. 1990), cert. denied, 500 U.S. 915 (1991). Therefore, “an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each.” Heath v. Alabama, 474 U.S. 82, 89 (1985) (quoting United States v. Lanza, 260 U.S. 377, 382 (1922)). Furthermore, defendant is serving his state and federal “punishments” simultaneously -- I directed that he serve his federal sentence in state prison so that he would get credit for both his state and federal sentences. Thus, McNair is serving no additional time in jail as a result of the two prosecutions.

For the foregoing reasons, defendant’s motion will be denied. An appropriate order follows.

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ORDER

AND NOW, this day of April, 1999, upon careful consideration of Joseph McNair's motion to vacate, set aside, or correct his sentence, the government's response, and defendant's reply thereto, IT IS HEREBY ORDERED that the motion is DENIED.

The defendant not having made a substantial showing of a violation of the Constitution or laws of the United States, a certification of appealability is DENIED.

William H. Yohn, Jr., J.